

ON THE SPECIFICS OF DOPING REGULATION IN SPORT

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Abstract: *The sports sector has been fighting doping globally by harmonized rules in The World Anti-Doping Agency's Code by strict liability. According to the Code it is each athlete's personal duty to ensure that no prohibited substance enters his or her body. Athletes are responsible for any prohibited substance or its metabolites or markers found to be present in their samples. Accordingly, it is not necessary that intent, fault, negligence or knowing use on the athlete's part be demonstrated in order to establish an antidoping violation. The article written for TLQ legal journal demonstrates how special regulation of doping is in the light of case of Jan Štěrba, bronze medalist of London 2012 Games. He was lucky that he escaped standard sanction of ineligibility and was punished only with reprimand for violation of Anti-Doping rules. The article at the same time presents additionally efforts of fight against doping by international cooperation among states by Council of Europe or UNESCO to enhance illustration how special doping regulation is. There is no doubt that this area of sports law will be still evolving due to many difficult and controversial aspects of it.*

Keywords: *doping, strict liability, WADA, Council of Europe, UNESCO*

INTRODUCTION

Despite growing public intervention in fight against doping, there is general agreement that the fight against doping is primarily an issue for sports governing bodies and that State intervention is intended to be parallel to and supportive of the action taken by sports organizations.¹ Is it so? Council of Europe for example created Anti-Doping Convention, indeed being aware that public authorities and the voluntary sports organizations have complementary responsibilities to combat doping in sport, notably to ensure the proper conduct of sports events on the basis of the principle of fair play and to protect the health of those that take part in them.² Private sports sector operates at the same time with World Anti-Doping Code ('WADA Code') created by World Anti-Doping Agency ('WADA', defined below in the following paragraph) to directly sanction doping athletes on the basis of strict liability, which is very concrete and strict one, as will be seen below. This article describes the regulation of some specific issues in fight against doping by sports federations according to WADA Code 2009³ and by international organizations like above mentioned Council of Europe or UNESCO.

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¹ RIGOZZI A., KAUFMANN-KOHLER G., MALINVERNI G. Doping and Fundamental Rights of Athletes: Comments in the Wake of the Adoption of the World Anti-Doping Code, *ISLR*, issue 3, 2003, p. 43.

² <http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=135&CM=8&CL=ENG>, Preamble to the Anti-Doping Convention of 1989.

³ This article was submitted to the publisher in October 2012. For the future timetable plan of WADA Code's review for new version of the Code to be operational for 2015 see an official publication of WADA, *Play True*, Issue 1, 2012, available at <http://www.wada-ama.org>.

THE WORLD ANTI-DOPING AGENCY (WADA)

1.1 The nature of WADA

WADA was established in November 1999 in form of foundation under Swiss law as a result of World Conference on Doping in Sport (which took place in Lausanne in February 1999). International Olympic Committee (IOC) convened this conference including representatives of sports sector, governments and intergovernmental organizations. The WADA's Foundation Board reflects composition of these stakeholders and consists of representatives of Olympic movement, that is the International Olympic Committee, National Olympic Committees, International Sports Federations and athletes, further it includes representatives of governments from all five continents.

In the interests of having the most effective agency possible, the IOC agreed that it would fund the first two years of operations, but that, effective January 1, 2002, governments would be responsible for 50 per cent of the budgets from that time forward.⁴ Leading product connected with WADA is the WADA Code, a single document which is the first to harmonize regulations regarding anti-doping across all sports.⁵ It was made out of cooperation with sportsmen, the International Intergovernmental Consultative Group on Anti-Doping in Sport, the Council of Europe, states representatives, national anti-doping organizations, sporting associations, the General Assembly of International Sport Federations, the Court of Arbitration for sport (CAS)⁶ and WADA working committees. On March 5th 2003 major sports federations with support of 80 governments approved the Code version no. 3.0, followed by working of the Code in practice before 2004 Olympic Games.⁷ WADA code has been amended since its creation and the below text in this article concerns up to now operational version of 2009.

⁴ POUND R. The World Anti-Doping Agency: An Experiment in International law [2002]. *ISLR*, p. 56, governments needed more time to make arrangements for example within their national budgets to contribute to WADA. Current numbers can be found at official web page of WADA: http://www.wada-ama.org/Documents/About_WADA/Funding/WADA_Contributions_2012_update_EN.pdf. Picking the example of Czech republic (the home country of this legal magazine), 61, 977 USD was paid in 2012. Concerning Copenhagen Declaration, WADA received during its first two years US \$ 25 million from the Olympic Movement and WADA's budget was initially covered by public authorities payments according to Olympic regions (Africa 0,50%, Americas 29%, Asia 20,46%, Europe 47,5% and Oceania 2,54%).

⁵ Its predecessor was basically IOC Medical Code, resp. the Olympic Movement Anti-Doping Code, which worked similarly with many aspects of WADA Code as following example demonstrates: "...FINA implements for swimming, by its Doping Control Rules (DCR), the Olympic Movement's Anti-Doping Code. DCR 1.2(a) states that the offence of doping "occurs when a banned substance is found to be present within a competitor's body tissue or fluids". That definition corresponds to that in Article 2(2) of the abovementioned Anti-Doping Code, where doping is defined as the presence in an athlete's body of a prohibited substance or the finding that such a substance or a prohibited technique has been used..." (*para 2 of C-519/04 P Meca-Medina and Majcen v Commission* [2006] ECR I-6991).

⁶ Since 1983 CAS has dealt with many doping cases, representing 60% of arbitration conducted by CAS (TROVA, H., ALEXANDRAKIS, V., SKOURIS, P. *The Olympic Games of European Union*. Baden-Baden: Nomos, 2011, p. 136). CAS awards produced before or after the WADA Code, are of central importance in understanding the principles which underpin the Code (DAVID P. A guide to the World Anti-Doping Code, A Fight for the Spirit of Sport. *Cambridge University Press*. 2008, p. 10). More about CAS see BLACKSHAW J., SIEKMANN R. C., SOEK J. (eds.). *The Court of Arbitration for Sport 1984–2004, The Hague: T.M.C. Asser Press*, 2006 or in the Czech edition of this legal journal article in Czech: HAMERNÍK P. 'Is Court of Arbitration for Sport the real Highest Sports Court?' (HAMERNÍK P. Je Rozhodčí soud pro sport skutečně nejvyšším sportovním soudem? *Právník*. No. 11/2012).

1.2 Why WADA?

First of all it was necessary to determine harmonized doping rules in global sport which would be the same for all sportsmen to save concerns like fairness, ethics, human health or levelled playingfield. IAAF was the first International Federation which banned doping in 1929, followed by FIFA and UCI (cycling) in 1966.⁸ The history of doping regulation in sport is littered with examples of governing bodies failing to draft their doping codes competently. Little thought was given to the compatibility of doping rules between sports.⁹ In 1976 International Olympic Committee (IOC) banned anabolics steroids and in 1979 blood doping.¹⁰ According to Pound 'The seminal event that led to the creation of World Anti-Doping Agency (WADA) was the Tour de France in 1998. During this event, the French police found doping substances in the possession of certain of the teams... The sight of athletes being led away by the police, to face possible criminal charges, was most dramatic...the prospect of sport being governed by criminal law, with the concomitant intervention of the state, was thoroughly unattractive'.¹¹ The Tour de France scandal highlighted the need for independent international agency, which would set unified standards for anti-doping work and coordinate the efforts of sports organizations and public authorities.¹² It was indeed also necessary to resolve how to arrange out-of-competition testing and access of controls to sportsmen who spend most of the year outside the territory of sporting association where they are registered.¹³

2009 WADA CODE'S STRICT LIABILITY

2.1 Interpretation of WADA Code and Strict liability in doping violation in general

The legal environment of WADA Code provisions is specific. The Code is interpreted according to its Article 24 as an independent and autonomous text and not by reference to the existing law or statutes of the Signatories or governments. It contains 'core' Articles relating, primarily, to doping violations, the proof of violations and sanctions, which Signatories have to implement *verbatim* in order to accept the Code, and 'non-core' Articles, which provide for standards relating to the handling of anti-doping matters, which Signatories have to meet, but can reach in different ways.¹⁴ Signatories are WADA, IOC, na-

⁷ In the Olympics the IOC intended to authorize WADA to carry out Doping Controls, on behalf of IOC (IOC circular letter, June 4th, 2004, addressed to IOC Members, accredited labs, IOC Medical Commission Members, NOCs, NOC Medical Liaison Officers, International Summer Sport Federations on Olympic Programme, Olympic Games Organizing Committees, Anti-Doping Agencies, WADA with attached IOC Anti-Doping Rules, 2004 prohibited substances list and Athens 2004 doping control guide, available in 2004 at <http://www.wada-ama.org>).

⁸ TROVA, H., ALEXANDRAKIS, V., SKOURIS, P. op. cit., note 7, p. 135.

⁹ O'LEARY J. Practice Makes Perfect: An analysis of the World Anti-Doping Code 2009. *International Sports Law Journal*. 2012/1-2, p. 13. O'Leary continues with stating that governing bodies seemed unaware of how previous doping rules of their own sport interacted with new provisions. This includes for example in the Czech republic the problem of lack of number of qualified staff to do 'sports law' work. In BUBNÍK G., Legal Issues of Amended World Anti-Doping Code (*Právní problematika revidovaného světového antidopingového kodexu*). Ministry of Education, Youth and Sports seminar, December 12th 2008, Bubník reminds that disciplinary bodies are not often familiar with principles of doping law made by WADA.

¹⁰ TROVA, H., ALEXANDRAKIS, V., SKOURIS, P. op. cit., note 7, p. 136.

¹¹ POUND, R. op. cit., p. 53.

¹² TROVA, H., ALEXANDRAKIS, V., SKOURIS, P. op. cit., note 7, p. 136.

¹³ Practical examples are described in O'LEARY op. cit., p. 13.

¹⁴ DAVID, P. op. cit., p. 2.

tional Olympic Committees, the International Paralympic Committee, national Paralympic Committees, international federations, national anti-doping organizations and major event organizations.¹⁵

According to Art. 2.1.1 of WADA Code it is each Athlete's personal duty to ensure that no Prohibited Substance enters his or her body. Athletes are responsible for any Prohibited Substance or its Metabolites or Markers found to be present in their Samples. Accordingly, it is not necessary that intent, fault, negligence or knowing Use on the Athlete's part be demonstrated in order to establish an antidoping violation under Article 2.1. The inability to get a clear read on which athletes are "intentional cheaters" and which athletes are "innocent victims" has created the strict liability rule.¹⁶ The principle of strict liability evolved to make it possible for sports federations to pursue doping cases without enormous legal burden and cost to establish infractions.¹⁷ 'It is true that a strict liability test is likely in some sense to be unfair in an individual case... where the athlete may have taken medication as the result of mislabelling or faulty advice for which he or she is not responsible – particularly in the circumstances of sudden illness in a foreign country. But it is also in some sense "unfair" for an athlete to get food poisoning on the eve of an important competition. Yet in neither case will the rules of the competition be altered to undo the unfairness. Just as the competition will not be postponed to await the athlete's recovery, so the prohibition of banned substances will not be lifted in recognition of its accidental absorption. The vicissitudes of competition, like those of life generally, may create many types of unfairness, whether by accident or the negligence of unaccountable persons, which the law cannot repair.'¹⁸

As Rigozzi explained generally in the 4th Conference of CAS & FSA/SAV in Lausanne during his contribution 'Evidentiary Questions before CAS', unless law provides otherwise, each party must prove its case and in WADA Code, there is indeed some reversal of burden of proof based on presumptions.¹⁹ Article 3.2.1 of WADA Code establishes the above mentioned rebuttable presumption that the accredited laboratory by WADA made correct analyzing of its finding. Once it is shown through sanctioned doping control, that the banned substance is present in the athlete's system, the onus of proof shifts to the athlete to rebut the presumption of guilt.²⁰ In other words athlete tries somehow to create doubts concerning the chain of custody made

¹⁵ The nature of membership of national sports associations in international sports associations makes the Code binding for them (and consequently for individuals within their sport). About pyramid of sport see WEATHERILL, S. Is Pyramid Compatible with EC Law? In WEATHERILL, S. *European Sports Law, Collected Papers*. The Hague: T.M.C. Asser Press, 2007 (Description of relationship of associations in Czech edition of this journal I already covered in the article Jaký vliv má úprava mezinárodních sportovních asociací na vnitrostátní sport? [What Is the Influence of International Sports Associations, and Related Legislation, on National Sports?]. *Právník*. No. 12/2011). Governments obviously are not bound by the product of private sector like WADA Code but as will be seen below, they do undertake activities within the objectives of the Code.

¹⁶ TEITLER, S., RAM, H. Analyzing the New World Anti-Doping Code: A Different Perspective. *International Sports Law Journal*. 2008/1-2, p. 44.

¹⁷ McLAREN, R. Exceptional Circumstances: is it Strict? (2005). *ISLR*, issue 2, Sweet and Maxwell, p. 37.

¹⁸ <http://jurisprudence.tas-cas.org/sites/CaseLaw/Shared%20Documents/129.pdf>, CAS 94/129, *USA Shooting and Q. v UIT*, award of 23rd May 1995, *para* 14.

¹⁹ International Sports Law and Jurisprudence of the CAS, 4th Conference CAS & FSA/SAV, Lausanne 2012.

²⁰ KANE, D. Twenty Years on: An Evaluation of the Court of Arbitration for Sport. In BLACKSHAW, J., SIEKMANN, R., SOEK, J. op. cit., p. 469; For description of individual typical cases demonstrating this issue see McLAREN, R. CAS Doping Jurisprudence: What Can We Learn?, (2006). *ISLR*, issue 1, Sweet and Maxwell, p. 9 and what steps were taken in this area see also the work of the same author, McLAREN, R. WADA Drug Testing Standards, 18 *Marq. Sports Law Rev.*, 1, 2007–2008. Current WADA Code's International Standards for testing and laboratories are available at WADA's webpage <http://www.wada-ama.org/en/> in 'Download Center' section.

by accredited lab for example. This standard is not the “beyond reasonable doubt” we know from the movies²¹, but applicable regulations in sports associations bring different position. In O’Leary’s description the idea is that the standard of proof of Art. 3.2.1. of WADA Code is pitched somewhere between balance of probability and reasonable doubt which might seem like a reasonable position in that the standard on governing bodies is higher than that required in a civil case but lower than the criminal standard of proof, but as O’Leary admits, the practice is however difficult. If an athlete is not successful attacking the lab process, he will be sanctioned according to the WADA Code by ineligibility to compete for determined period of time (standard is two years) but the athlete still has the chance to have this consequent sanction of ineligibility either reduced or eliminated in the light of rules in WADA Code.

Specified substances distinguished

WADA Code basically prohibits so called Specified substances which are all prohibited substances except other (also prohibited) substances in the classes of anabolic agents and hormones and those stimulants so identified in the Prohibited list.²² Why there are Specified substances among all other prohibited substances? In the previous, 2003 version, the WADA Code provided why Specified substances seemed to be a bit different than those core prohibited ones. It stated that the Specified substances are those substances identified in the Prohibited List which are particularly susceptible to unintentional antidoping rule violations because of their general availability in medicinal products or which are likely to be successfully abused as doping agents. That is why there is a larger scale of sanctions with particular chance for less strict sanction in case of Specified substances. Thus nowadays in 2009 version athletes to become eligible for a reduced sanction (“only” reprimand in this example), they would have to prove not only the lack of intent to enhance the athlete’s sport performance or mask the use of performance-enhancing substance, but also to establish how this substance entered his or her body or came into his or her possession. How can athlete know precisely to answer this question to escape the sanctioning and convince the panel of disciplinary body based on balance of probabilities? This is evidentiary question. The Commentary - Notes to the amended Article 10.4 make it clear that an athlete who does not meet the criteria under Article 10.4 will be likely to receive the standard two year period of ineligibility, and could receive an increased period of ineligibility if aggravating circumstances are established by the anti-doping organization under article 10.6.²³ If the athlete does not fall under Article 10.4 of WADA Code, he or she is left to argue that he was not at Fault or Negligence, resp. Significant Fault or Negligence under art. 10.5 (on this article, see the text below). However the temptation to get into 10.4 category is obvious because it offers possibility of mere reprimand.²⁴

²¹ Rigozzi A. illustrates this creatively during his speech in above cited conference.

²² Prohibited List is available as part of the Code updated at http://www.wada-ama.org/Documents/World_Anti-Doping_Program/WADP-Prohibited_list/2012/WADA_Prohibited_List_2012_EN.pdf.

²³ DAVID, P. op. cit., p. 243. In TEITLER, S., RAM, H. Analyzing New World Anti-Doping Code: A Different Perspective, *International Sports Law Journal*, 2008/1-2, p. 45, authors add it will be difficult fulfill the criteria of 10.4 when the athlete attributes his positive finding to either contaminated nutritional supplement or party drugs. It is also important to note according to them that articles 10.4 and 10.5 of the Code (art. 10.5 concerning reduction or elimination of sanctions is described below) cannot be applied at the same time to a case involving specified substances.

²⁴ Nevertheless see the arguments of TEITLER, S., RAM H. op. cit., at p. 44, why WADA retained the rule that the in-competition detection of any substance or method in connection with a competition leads to the automatic disqualification of all individual results obtained in said competition, also in case of a specified substance violation where the athlete established that he did not intend to enhance his sport performance.

Borderline of punishment in the light of Jan Štěrba case

Facts of the dispute

The case of Jan Štěrba can be illustrating for this issue, despite rules of sports federation were used, nevertheless they copied WADA Code rules.²⁵ The athlete was tested during International Canoe Federation (ICF) Qualifier in Poznan, Poland and was asked to fill out the Doping Control Form before taking the sample. He recorded in the document that he uses Vitamin 4, “Energezye” napoje, Star Life and Shotgun nutritional supplement. The urine A sample revealed the presence of Beta-methylphenylethylamine (BM). Based on presence of this BM in the WADA 2012 Prohibited list (group S6-Stimulants), the Polish WADA accredited lab evaluated the result as Adverse Analytical Finding. ICF notified Czech national association – Czech Canoe Union (CCU) to suspend him and stating that since this athlete was part of Czech olympic qualifying team the ICF must instruct the Czech Canoe Union not to select him for Olympic Games until the doping case is finalized (*para* 2.9 of the award), resp. later clarified that the substance is included under the Similarity Prohibition Clause: “any other substances with similar chemical structure and similar biological effect(s)”, referring to category 6b of Prohibited List (*para* 2.13 of the award). Štěrba was provisionally suspended and he meanwhile requested the B-sample, copy of analysis done by WADA lab and lifting of the above provisional measures. B-sample confirmed the presence of BM. Based on this ICF Doping Control Panel (ICF DCP) found that BM was similar to a Non-Specified Stimulant listed under S6a category of 2012 Prohibited List and because BM had similar biological effects to amphetamine it was caught under Similarity Prohibition Clause (*para* 2.9. of the award). Sanction of 6 months of ineligibility was imposed.²⁶

Thus an appeal was made to ICF Court of Arbitration (ICFCA) by the Athlete. Although ICFCA found that A and B sample analyses were sufficient concerning evidence of BM in the urine sample, the decision of ICFCA was that ICF had not established the BM detected to be considered a Prohibited substance under 2012 Prohibited list (their reasoning for this was that, despite the chemical structural similarity between BM and amphetamine, the Similarity Prohibition Clause was, on its true construction, only applicable to substances similar to S6b Specified Stimulants and not to those similar to S6a Non-Specified Stimulants. They further found that any ambiguity in wording or interpretation of the S6 category may not be to the disadvantage of Jan Štěrba and, therefore, had to be interpreted in his favor (*para* 2.20 of the award). ICFCA set aside the decision of ICF and replaced it by stating that no Anti-Doping rule violation was committed.

Since decision was made in July 2012 and reasons were delivered to parties on 29th of July, time was running to the start of Olympics Štěrba to be admitted back to competitions, thus the athlete filed “pre-emptive application to CAS” and sought “to confirm decision of ICFCA because there was long hesitation of ICF whether it will appeal ICFCA decision. CAS found that the athlete did not have standing to bring the appeal ‘as he was not seeking to challenge the ICFCA decision but to have it confirmed instead’ (*para* 2.22 of the award). The case moved to Ad Hoc Division of CAS with request of ICF to set aside the decision of the ICF Court of Arbitration and to restore original decision of ICF DCP. Thus the athlete was respondent this

²⁵ CAS Ad Hoc Division CAS OG /12 07 *International Canoe Federation v. Jan Štěrba*, August 6th, 2012.

²⁶ The decision of ICF DCP is available at http://www.canoeicf.com/icf/Misc/ICF-Doping-Control-Panel---Jan-Sterba-case/main/0/text_files/file/Decision%20of%20ICF%20Doping%20Control%20Panel%20-%20Sterba.pdf.

time.²⁷ COC and IOC were referred as ‘Other parties’ (IOC due to lack of evidence or arguments declined to appear before the panel, as stated in *para* 3.9 of the award).

The dispute’s resolution

The panel of Ad Hoc Division of CAS went through three elementary points, first it concluded that BM is prohibited substance, a stimulant. Secondly it was determining violation of Anti-Doping rules. The panel came to the conclusion in the light of strict liability that Anti-Doping violation was committed (*para* 6.5.4 of the award). The final question remained what sanction? What will be the regime of justification WADA Code offers? The crucial point was that athlete did establish how the Specified Substance entered his body through use of the Supplement.²⁸ There was absence of an intention to enhance sporting performance (he already qualified to Olympics when he was tested) and there was mention of the use of supplement in the Doping Control Form by the athlete. The alternative of Article 10.4 of WADA Code for the Panel to be used was satisfied and mere reprimand was finally the punishment. Moreover in the light of steps the athlete did in checking the substance and comparing it with 2012 Prohibited list if it is or not prohibited substance, the problems could have been avoided if indeed the BM was expressly in the Prohibited List. This had effect on level of fault of the athlete and the consequential sanction. ‘Arbitration panels often wrestle with the issue of how to ‘classify’ an athlete who has tested positive, because it is so difficult to establish the exact circumstances of a specific case. This can be especially the case when athletes test positive for substances that are not expressly mentioned on the Prohibited List’.²⁹ BM was known to the Anti-Doping governing bodies (expressly WADA) for many years as a stimulant and there had even been discussions within these bodies on the issue of whether or not expressly to list the substance on the Prohibited list, which they finally decided not to (*para* 6.6.17 of the award).³⁰ The athlete also sought independent advice of qualified practitioner. Nevertheless the panel has not found the Respondent to be without fault completely (*para* 6.6.16 of the award because there were the CCU and the COC medical professionals to be consulted for example). The degree of fault was so small that it justified the sanction of mere reprimand.

No fault or negligence/No significant fault or negligence justifications excluded

David predicted that under the 2009 WADA Code, tribunals will still have to consider the application of articles 10.5.1 and 10.5.2 in cases where non-specified substances are concerned, but, where one of the many substances is detected which will fall within the category of ‘spec-

²⁷ See Art. 61.2 of the Olympic Charter and Art. 17 of the CAS ad hoc Rules according to which any dispute arising in the Olympic Games shall be resolved by CAS pursuant the above mentioned Charter, the applicable regulations of sports associations, general principles of law and the rule of law, the application of which CAS deems appropriate.

²⁸ Also the final determination of nature of the BM substance, see various opinions, for example Dr. Olivier Rabin, Science Director of WADA and others at http://www.canoeicf.com/icf/Misc/ICF-Doping-Control-Panel—Jan-Sterba-case/main/0/text_files/file6/Jan%20Sterba%20CZE.pdf.

²⁹ TEITLER, S., RAM, H. op. cit., p.44.

³⁰ See criticism of Open list and phrase “and other substances with (a) similar chemical structure or similar biological effects(s)” or reference to “including but not limited to” by TEITLER, S., RAM, H. op. cit. at 47.

ified substances' under the Prohibited List, it seems to be likely that tribunals will have to consider difficult questions such as whether an athlete has met the burden of establishing that there was no intent to enhance sporting performance, and, if this is established, what the appropriate sanction is within the range permitted under Article 10.4.³¹ This happened in Jan Štěrba case. If Art. 10.4 could not be applied in the light of above, then standard justifications are in place according to Art. 10.5.1 and 10.5.2 of the WADA Code of 2009, which also further offers the possibilities that sanctions of period of ineligibility can be reduced or even eliminated based on truly exceptional circumstances. It means that the athlete establishes:

1) In case of Art. 10.5.1 of WADA Code that he or she bears **No Fault** or Negligence, the otherwise applicable period of Ineligibility shall be eliminated. When a Prohibited Substance or its Markers or Metabolites is detected in an Athlete's Sample in violation of Article 2.1 (Presence of Prohibited Substance), the Athlete must also establish how the Prohibited Substance entered his or her system in order to have the period of Ineligibility eliminated. However to escape sanction according to this article the sabotage of competitor would be necessary to be proven to eliminate the sanction. The section contemplates that there has been no involvement of an athlete in committing doping offence.³² Therefore the panel did not apply this article in case of Jan Štěrba.

2) In case of Art. 10.5.2 of WADA Code if an Athlete or other Person establishes in an individual case that he or she bears **No Significant Fault** or Negligence, then the otherwise applicable period of Ineligibility may be reduced, but the reduced period of Ineligibility may not be less than one-half of the period of Ineligibility otherwise applicable. If the otherwise applicable period of Ineligibility is a lifetime, the reduced period under this Article may be no less than eight (8) years. When a Prohibited Substance or its Markers or Metabolites is detected in an Athlete's Sample in violation of Article 2.1 (Presence of a Prohibited Substance or its Metabolites or Markers), the Athlete must also establish how the Prohibited Substance entered his or her system in order to have the period of Ineligibility reduced. An athlete who failed to take the clear and obvious precautions that reasonable athlete would take will not be able to rely on the article.³³ Initially this point was a bit to some extent blurred by Jan Štěrba who initially requested Art. 10.5.2 justifications (see *para* 6.6.8 of the award) but again the panel did not apply it for lack of truly exceptional circumstances. This Article does not offer reprimand. The WADA Code in Article 10.5.2 'does not envisage a sanction less than 12 months'.³⁴

³¹ DAVID, P. op.cit., p. 251.

³² McLAREN, R. *Cas Doping Jurisprudence: What Can We Learn?*, op. cit., p. 19. Commentary to the Art. 10.5.1 right in the WADA Code states, that this article is not applicable concerning situations of positive test resulting from (a) mislabeled or contaminated vitamin or nutritional supplement (Athletes are responsible for what they ingest) and have been warned against the possibility of supplement contamination; (b) the administration of a Prohibited Substance by the Athlete's personal physician or traper without disclosure to the Athlete (Athletes are responsible for their choice of medical personnel and for advising medical personnel that they cannot be given any Prohibited Substance); and (c) sabotage of the Athlete's food or drink by a spouse, coach or other Person within the Athlete's circle of associates (Athletes are responsible for what they ingest and for the conduct of those Persons to whom they entrust access to their food and drink). However, depending on the unique facts of a particular case, any of the referenced illustrations could result in a reduced sanction based on No Significant Fault or Negligence according to Art. 10.5.2 of WADA Code (described below), for example, reduction may well be appropriate in illustration if the Athlete clearly establishes that the cause of the positive test was contamination in a common multiple vitamin purchased from a source with no connection to Prohibited Substances and the Athlete exercised care in not taking other nutritional supplements.

³³ DAVID, P. op. cit., p. 180.

³⁴ DAVID, P. op. cit., p. 181.

These were very difficult and specific issues indeed. CAS is the final appeal body according to WADA Code and also due to this decision Jan Štěrba won the bronze medal in London Olympics. If the result was not in his favor, he would be fired by his club and lost his career, as he said in one of his interviews.³⁵ The destiny of doping control will be most probably directed in a way depending how the WADA rules will be able to resist appeals of athletes in the light of general law.³⁶ On the other hand the issue is also political, as the load of documents from the states illustrates below.

COUNCIL OF EUROPE AND UNESCO EFFORTS TO FIGHT DOPING HAND IN HAND WITH WADA

3.1 Council of Europe and Doping

‘Subsequent to the Council of Europe’s fight against doping that it had been carrying out since early 1960s and that involved a series of non-binding resolutions and recommendations, a decisive step in terms of public international sports law was taken in 1989, when the first intergovernmental agreement against doping was adopted in the form of Council of Europe Anti-Doping Convention. The Convention was extended in 2004 by means of supplementary protocol, which is the first binding international agreement recognising the competence of WADA.’³⁷ Let’s have a look briefly at some of these documents.

Among mentioned non-binding recommendations and resolutions of Council of Europe was the adoption of Resolution No. 67/12 by Ministers’ Deputies in 1967, which provided a first definition of doping that was accepted for several years – it talked of chemical or physiological manipulation – and was sufficiently broad to include types of doping not even thought of in 1967, such as blood doping.³⁸ It focused on ethical and moral aspects of sport, on responsibility of sport organizations to combat doping and also being aware that sport is international, so there was an emphasis on a need for the international sports organizations to ensure equality of chances and obligations for all national federations.³⁹ At the same time Council of Europe persuaded governments to take action in this area only in cases where sports associations don’t act. The Recommendation stressed respect of governments to sports organisations self-regulation. They are the bodies to regulate competitions including doping issues. Nevertheless in subsequent actions Council of Europe wished to mini-

³⁵ At <http://sport.aktualne.centrum.cz/sportplus>, September 29th 2012. To minimize often declared draconian approach in WADA system, WADA offers also Therapeutic Use Exemptions (TUE), so athletes may in advance request this exemption if in the medicine they use is a substance which is in the Prohibited list of banned substances. For conditions to obtain TUE see <http://www.wada-ama.org/en/Science-Medicine/TUE/>.

³⁶ For example the destiny of so called Whereabouts rule of Article 2.4 of the WADA Code in the light of privacy rights. Sportsmen must report in advance precisely where they will be available and what time for out-of-competition testing purpose and ‘Any combination of three missed tests and/or filing failures within 18 month period as determined by Anti Doping Organisations with jurisdiction over the Athlete shall constitute an anti-doping rule violation’.

³⁷ WAXA. Public International Sports Law – A “Forgotten” Discipline? *International Sports Law Journal*. 2010/3-4, p. 27.

³⁸ Background of Explanatory Report to the Anti-Doping Convention of Council of Europe, available at <http://conventions.coe.int/Treaty/en/Reports/Html/135.htm>. See also SIEKMANN, R., SOEK, J. (ed.). *The Council of Europe and Sport, Basic Documents, The Hague: T.M.C. Asser Press*, p. 39–126.

³⁹ Explanatory Report to the Anti-Doping Convention, op. cit.

mize differences of treatment in doping issues in various states concerning adequate testing by sufficient number of laboratories etc. Another efforts took place later, mainly on ethics, fair play or health issues in sport. Governments at Council of Europe offered help of public authorities to sports organizations concerning finance and technical facilities in the fight against doping and declared this way its approach against doping.

By adoption of European Anti-Doping Charter for Sport by the Committee of Ministers on 25th of September 1984, Council of Europe persuaded governments of Member States to take all appropriate steps within their competence to cooperate among themselves to minimize doping. Among others to facilitate carrying out the doping controls and to set up and run internationally recognized laboratories for this purpose, plus attain technical standards and support research by various educational-training programs. In order to promote ethical and physical values of sport, Member states were encouraged assist financially in efforts to control doping or push sports associations to adopt mechanisms defeating doping as a condition to receive public subsidies etc. Sports associations were encouraged to harmonize their antidoping regulations, list of banned substances and procedures. At the same time also to include in their regulations, as a condition to participate in official competitions, a clause compelling sportsmen to submit to eventual authorized doping control test, plus to agree on penalties as a consequence of using doping, including those who provide and assist in doping activity. Concerning already mentioned Anti-Doping Convention, major task in the anti-doping campaign again was to secure international harmonization, not only between sports but also between countries.⁴⁰

Committee of Ministers adopted the Anti-Doping Convention in September 1989. Explanatory Report on Anti-doping Convention stated that “The Convention is conceived as an instrument to intensify international cooperation and harmonization in the antidoping campaign. Its essence derives from the political desire to help safeguard the ethics of sport and to preserve the underlying purpose of the Sport for All philosophy. The Convention is not an instrument for bringing about sophisticated technical changes, but a reassertion, at a crucial moment in sport’s history, of certain lasting principles.” According to Article 1 of the Convention Parties undertake within the limits of their respective constitutional provisions to take the steps necessary to apply the provisions of this Convention. Convention also covers the definition of doping and doping substances in sport. Parties are to feature domestic co-ordination of governments in doping policies combating doping and ensure that practical application of Convention is fulfilled. Parties should adopt, where appropriate, various legislative or administrative measures to eliminate availability of doping. The Convention adopts the elementary objectives and tasks already described above in the Charter. It does not forget Parties to encourage their sports organizations to undertake doping controls on an effective scale. This includes controls without warning in advance, cooperation during testing abroad and harmonizing eligibility criteria for sportsmen participating in the official competitions with clause on accepting antidoping controls. Convention sets up the Monitoring group consisting of Parties to the Convention or observers to, among others, monitor application of the Convention and approve the list, and any revision thereto, of phar-

⁴⁰ Explanatory Report to the Anti-Doping Convention, *op.cit.*, *para* 27.

macological classes of doping agents and doping methods banned by the relevant international sports organizations and the criteria for accreditation of laboratories.⁴¹

3.2 UNESCO and Doping

At the same time another effort of Governments was declaration to recognize and support WADA and its Code adopted by WADA Foundation Board at the World Conference on Doping in Sport (Copenhagen, March 3rd-5th, 2003). In order to advance the harmonization of anti-doping policies in sport, governments bound themselves to create a convention on fighting the doping. Thus finally representatives of UNESCO member countries decided to create the International Anti-Doping Convention (International Convention) at the organization's 32nd General Conference in October 2003. Governments cannot be legally bound by a non-governmental document such as the World Anti-Doping Code⁴² but by the International Convention it would be even more possible to support the WADA Code objectives and cut streams of prohibited substances by supervision of states. International Convention of UNESCO has similar approach like Council of Europe Convention - to fight doping together in partnership⁴³ with government and private sector to achieve successful results. UNESCO directs at prevention in similar way like its colleague, the Council of Europe Convention (establishing funds for support of fight against doping, monitoring committee etc.). Also as O'Leary points out, the International Convention is interesting because it according to its Article 2 'adopts, overtly, the WADA Code whilst asserting the primacy of the Convention where there is such conflict. Such conflict is inevitable as the Convention stands, referring as it does to the repealed 2003 Code.⁴⁴

⁴¹ Among other measures of soft law of Council of Europe was the Committee of Ministers Recommendation No. R (92) 13 REV on the Revised European Sports Charter. The Charter complements the ethical principles and policy guidelines set out also in the Anti-Doping Convention. Governments in this Charter respect again that role of public authorities is mainly complementary to the action of sports movement, however at the same time establishing close cooperation with sports non-governmental organizations to implement goals set up in the Charter, to protect moral and ethical values of sport, including to make public funds to fulfill aims of the Charter. The Code of Sports Ethics was also adopted, where the objectives are that governments should encourage the adoption of high ethical standards in all aspects of society within which sport operates, support and encourage efforts of organizations and individuals to promote ideas of ethical and fair sport. At the level of EU, there were also backings like the joint statement of EU ministers of sport in June 1999 that "Effective doping prevention cannot do without deterring sanctions and that therefore a system of internationally applicable and equivalent sanctions is needed, such as two year minimum ban for first ban offenders (summary of EU activities for comparison with Council of Europe efforts at webpage of Council of Europe, <http://assembly.coe.int/Mainf.asp?link=/Documents/WorkingDocs/Doc00/EDOC8726.htm>, section titled The Position of the European Union. EU lacked power to further action since its Treaties did not concern sport expressly before the Treaty of Lisbon and its Article 165 of the Treaty on Functioning of the European Union (TFEU). The most tangible step of one of EU institutions – the Court of Justice - in relation to doping was acceptance of doping rules as not infringing the rules on competition according to articles 81 and 82 of EC Treaty (now 101 and 102 of the TFEU) in the case of C-519/04 P *Meca-Medina and Majcen v Commission* [2006] ECR I-6991. Further see also WEATHERILL, S. The white paper on sport as an exercise in 'better regulation. In SIEKMANN, R., GARDINER, S., PARRISH, R. *EU, Sport, Law and Policy, Regulation, Re-regulation and Representation, The Hague: T.M.C. Asser Press*, 2009.

⁴² The form of fighting the doping by public authorities expressed in text of Copenhagen declaration, when supporting WADA Code (before UNESCO Convention was created), included many vague terms like states 'should', 'where appropriate', 'support', 'within the limits of constitutional and other legal provisions and acknowledge the diversity in constitutional and legal systems' etc.

⁴³ WAX, A., op. cit., p. 28.

⁴⁴ O'LEARY, op. cit., p. 13. WAX, A. op. cit., at p. 27 also picks the fact, that WADA annexes to the Convention such as *Prohibited List* and the *Standards for Granting Therapeutic Use Exemptions* are, under Art. 4, para 3 of the Convention integral to its operation.

CONCLUSION

Strict liability in WADA's doping regulation is among others defended because "...It is likely that even intentional abuse would in many cases escape sanction for lack of proof of guilty intent. And it is certain that a requirement of intent would invite costly litigation that may well cripple federations – particularly those run on modest budgets – in their fight against doping..."⁴⁵ On the other hand fair treatment of athletes must be secured. There are concerns that the consistency of strict liability with principles such as presumption of innocence, *nullum crimen sine lege*, *nulla poena sine lege* and *nulla poena sine culpa* is „doubtful“.⁴⁶ If the regulators fail to get the balance right, then anti-doping programmes will be subject to forceful challenge.⁴⁷ This process of juridification already happens in the light of fundamental rights⁴⁸ or economic freedoms of provision of services or competition law.⁴⁹ Especially challenging will be the so called Whereabouts rule. WADA seems to be progressing towards the best methods and working already on new version of the Code by review with stakeholders who are concerned. Thus those who feel somehow connected with functioning of WADA Code should take the chance to influence its shape in this 'vibrant and interesting legal area'⁵⁰. The question of time will show how much the objectives of WADA shall remain where they are or if stronger word comes from Council of Europe, EU or UNESCO in similar way like some opinions suggest that CAS, highest appeal body according to WADA Code, should get to public plane and be established by international treaty by states,⁵¹ despite it works effectively and fairly. It looks that for survival of WADA Code's principles method of negative harmonization shall be decisive (courts in challenges of WADA by athletes will or will not declare its rules compliant with general law, with potential risks of searching forum shopping by applicants) and public side of doping control shall be official support of the WADA activities by governments without direct sanctions against athletes breaching rules of the game by using doping and also without severe sanctions against the states.⁵²

⁴⁵ <http://jurisprudence.tas-cas.org/sites/CaseLaw/Shared%20Documents/129.pdf>.

⁴⁶ TROVA, H., ALEXANDRAKIS, V., SKOURIS, P. op. cit., p. 136.

⁴⁷ LEWIS, A., TAYLOR, J. *Sport: Law and Practice*, 2nd ed., Tottel Publishing Ltd., Reprinted in 2010, p. 836. For comparison see example of above Council of Europe documents which stress fair examination in the proceedings which may lead to doping conviction of accused athletes. It includes provisions on adoption of principles of natural justice and ensuring the respect for fundamental rights of suspected sportsmen (reporting and disciplinary bodies to be separate, conduct fair hearing, assistance and representation provided to sportsmen, clear and enforceable provisions for appeal etc).

⁴⁸ RIGOZZI, A., KAUFMANN-KOHLER, G., MALINVERN, I. G. op. cit.

⁴⁹ C-519/04 P *Meca-Medina and Majcen v Commission* [2006] ECR I-6991.

⁵⁰ Terminology used by O'LEARY op. cit., p. 19.

⁵¹ M. J., OPIE, H. "Sports Law": *Implications for the Development of International, Comparative and National Law and Global Dispute Resolution*. Marquette Law School Legal Studies Paper, June 11th 2010 Final Draft. Milwaukee: Marquette University Law School, 2010.

⁵² The Czech republic currently does not have accredited lab for doping tests because of lack of financial resources, has there been any sanction from Council of Europe? Only rather sad statement of representative of Czech antidoping authority (emanation of the Ministry of Education, Youth and Sports) illustrates this fact of missing lab by saying "well how to say it, it is trifle", <http://sport.aktualne.centrum.cz/sportplu>, October 2nd, 2012.